

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BARBARA SCHWAB, et al., :
individually and on behalf of all :
others similarly situated :
:
VS. : C.A. NO. CV 04-1945
:
PHILIP MORRIS USA, INC., et al. :

VOLUME 2, VIDEOTAPED DEPOSITION OF JEFFREY E.

HARRIS, M.D., Ph.D., a Witness in the above-entitled cause, taken on behalf of the Defendants, before Carole J. Ogden, Registered Professional Reporter, a Notary Public in and for the State of Rhode Island, at the offices of Blish & Cavanagh, LLP, 30 Exchange Terrace, Providence, Rhode Island, 02903, on March 9, 2006 at 9:00 a.m.

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1 America?
2 A. I believe that's right.
3 Q. Marlboro Red is second?
4 A. Yes.
5 Q. Winston is well down the list, Winston full flavored
6 is well down the list?
7 A. I don't know where it is.
8 Q. Let me ask you to assume for purposes of this question
9 that the market share of Winston full flavored has
10 declined precipitously, and that it's now eclipsed by
11 many other brands and styles. Okay?
12 A. Okay.
13 Q. Doctor, are you aware of any pricing decision by R.J.
14 Reynolds, the manufacturer of Winston full flavored,
15 to reduce the price of Winston full flavored in
16 relation to other premium cigarettes as a result of
17 the declined market share of Winston full flavored?
18 A. I am -- I believe there was a contemplated
19 decision, and I believe that was referred to in an
20 internal document that was placed in evidence in the
21 Price trial, but I'd have to look at that document
22 again to give you a complete answer.
23 Q. Are you aware of whether the price of Winston was ever
24 actually reduced by the manufacturer in relation to
25 the price of other premium cigarettes?

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1 A. No.
2 Q. Well, let's go over some examples. Okay? Let's turn
3 first to soda, to soft drinks. Coca Cola makes many
4 products?
5 A. Yes, it does.
6 Q. Even within the range of products called Coke, there's
7 Coca Cola, there is non-caffeinated Coca Cola, there's
8 Diet Coke, there's un-caffeinated Diet Coke, there's
9 Cherry Coke, there's Diet Cherry Coke, there's Cherry
10 Vanilla Coke, there is Diet Cherry Vanilla Coke, there
11 is Lime Diet Coke, there's Lemon Diet Coke, and there
12 are other Coke products. Are you familiar with any
13 difference in price among those different products?
14 A. I haven't --
15 MR. GALLAGHER: I'm going to object to
16 the waste of Dr. Harris' time that these type of
17 questions are. Go ahead, Dr. Harris.
18 MR. GROSSMAN: Your objection is
19 noted.
20 MR. GALLAGHER: Let's talk about Coke.
21 A. I haven't studied that. I don't know.
22 Q. As a consumer, have you noticed any difference in
23 price among those?
24 A. No. I don't buy Coca Cola at all.
25 Q. Do you buy Pepsi?

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1 MR. GALLAGHER: Objection to the form.
2 A. During the price war of 1983, yes.
3 Q. In relation to other premium cigarettes?
4 A. Yes. There was a time in 1983 where the prices
5 did not line up.
6 Q. Brief period of time; is that correct?
7 A. Several months, yes.
8 Q. You mean 1993?
9 A. 1993. Sorry.
10 Q. So-called Marlboro Monday and its aftermath?
11 MR. GALLAGHER: Marlboro Friday.
12 Q. Marlboro Friday and its aftermath?
13 A. The commonplace trade name for the price war is
14 Marlboro Friday, or for the initiation of the price
15 war, but the price war itself, according to current
16 economic views, lasted a considerable amount of time.
17 Q. Now, it's common for manufacturers of consumer
18 products to price all of their products or
19 substantially all of their products at the same price,
20 regardless of relative market share of the products
21 involved; is that correct?
22 MR. GALLAGHER: Objection to the
23 form.
24 A. Could the question be read back.
25 (LAST QUESTION READ BACK)

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1 A. No.
2 Q. Do you buy any soft drinks?
3 A. From time to time.
4 Q. And when you do, do you notice a difference in price
5 by the flavor of the soft drink involved from the same
6 manufacturer?
7 A. I don't buy enough sodas to give you an answer to
8 that question.
9 Q. Do you ever buy yogurt?
10 A. From time to time.
11 Q. In any given brand, say Yoplait, is there a difference
12 in price between blueberry versus apricot versus mango
13 versus blackberry?
14 A. You mean in contradistinction to any difference
15 between Yoplait and Columbo?
16 Q. Yes.
17 A. I don't know.
18 Q. Have you ever noticed any difference in price with any
19 given brand for different flavors of the yogurt?
20 A. If you're asking me as an individual consumer, I
21 don't know. If you're asking me as an expert, I do
22 not intend to render any opinions on the prices of
23 yogurt or soft drinks in this case.
24 Q. I am going back to the question I asked before. Isn't
25 it true that with consumable products manufacturers

<p>1 often decide to price all of their flavors, all of 2 their products at the same price regardless of the 3 percentage market share of those individual flavors?</p> <p>4 MR. GALLAGHER: Objection to the form.</p> <p>5 A. No. That's not a general rule. That sometimes 6 occurs in certain markets, and it can depend on a 7 number of economic factors, but it is hardly 8 universal.</p> <p>9 Q. I didn't say it was universal. It is common. It is 10 done with regard to a number of food and other 11 consumer products?</p> <p>12 A. I can't put a handle on the word "common" when 13 think about a hard back versus a soft back textbook 14 for my students, so I don't think I can answer that 15 with any specificity. Certainly there are lines of 16 products in which different variations of the same 17 product have the same retail price, and there are 18 still others where there are substantial variation by 19 product type, even within the same brand.</p> <p>20 Q. Could you give me an example of the second.</p> <p>21 A. If somebody bought a car, the price would vary 22 depending on whether there was air conditioning, a 23 stereo system, a sun roof, the power of the engine and 24 other features, even though all those cars are the 25 same brand.</p>	<p>1 nonetheless charge different prices for different 2 medications or drugs depending on many different 3 attributes such as capsules versus coated, long acting 4 versus short acting, generic versus prescription, and 5 drugs, medications are consumable.</p> <p>6 Q. Isn't it correct that in the cigarette industry, 7 cigarette manufacturers generally have not changed the 8 prices for specific brands or styles of cigarettes to 9 meet the market share of that particular brand or 10 style?</p> <p>11 MR. GALLAGHER: Objection to the form.</p> <p>12 A. I don't understand your question.</p> <p>13 Q. The market share for regular cigarettes has declined 14 over the past 30 years; is that correct?</p> <p>15 A. Do you mean non-filter cigarettes? Yes.</p> <p>16 Q. Yes. Let me -- that's a very good -- that's a very 17 good answer to that question. What does regular 18 cigarette mean?</p> <p>19 A. I don't know.</p> <p>20 MR. GALLAGHER: Objection to the form.</p> <p>21 These are your terms, full flavor, regular.</p> <p>22 MR. GROSSMAN: No. Regular is your 23 term.</p> <p>24 MR. GALLAGHER: Why don't you define 25 the terms that you want? This is not a test. Do you</p>
<p>Page 451</p> <p>1 Q. Manufacturers' costs would vary tremendously on -- 2 based upon whether there was air conditioning or a sun 3 roof, right?</p> <p>4 MR. GALLAGHER: Objection to the form.</p> <p>5 A. I don't know how much car manufacturers' costs 6 actually vary.</p> <p>7 Q. You haven't studied that; is that correct?</p> <p>8 A. No. But they do vary.</p> <p>9 Q. And a particular brand of car may be sold not only in 10 different colors but with many different 11 specifications; is that correct?</p> <p>12 A. Correct.</p> <p>13 Q. But in consumable products, which is what I was asking 14 about, people don't eat cars, right?</p> <p>15 A. People do not eat cars, correct.</p> <p>16 Q. In consumable products could you give me an example of 17 industries where companies price differently based 18 upon different flavors and where the manufacturing 19 costs are essentially the same?</p> <p>20 MR. GALLAGHER: I'm going to renew my 21 objection about this being a waste of time.</p> <p>22 MR. GROSSMAN: Okay.</p> <p>23 A. In the pharmaceutical industry, sellers of both 24 prescription and over-the-counter products whose 25 marginal costs of production are very small will</p>	<p>Page 453</p> <p>1 want to get a dictionary out to tell you what regular 2 means? What does your company mean, say it means? 3 You're its representative.</p> <p>4 Q. Doctor, regular cigarette is an ambiguous term; is 5 that correct?</p> <p>6 MR. GALLAGHER: Objection to the form.</p> <p>7 Q. It could mean different things to different people?</p> <p>8 A. It could mean, in a different context, if you said 9 regular non-filter or regular filter.</p> <p>10 Q. But if you just say regular cigarette, it's an 11 ambiguous term?</p> <p>12 A. Correct.</p> <p>13 Q. Now, Doctor, because it could refer to a non-filtered 14 cigarette or to a filtered full flavor cigarette; is 15 that correct?</p> <p>16 A. Or it could have other connotations as to what a 17 person's regular brand is for example.</p> <p>18 Q. All of those are possible connotations; is that 19 correct?</p> <p>20 A. Out of context, yes.</p> <p>21 Q. Doctor, the -- let me rephrase my earlier question to 22 take out the ambiguity. The market share for filter 23 cigarettes with 16 milligrams of tar or above has 24 declined greatly over the last 40 years; is that 25 correct?</p>

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<p>1 A. I don't know. You said filter cigarettes?</p> <p>2 Q. Filter cigarettes with 16 milligrams of tar or above.</p> <p>3 A. I know the market share of all cigarettes with FTC</p> <p>4 tar of 16 and above has declined since the 1970s, but</p> <p>5 I -- and I know that the market share of non-filter</p> <p>6 cigarettes has declined considerably, but if you focus</p> <p>7 on filter cigarettes, I'd rather look that up before</p> <p>8 answering.</p> <p>9 Q. Okay. You have no opinion on that?</p> <p>10 MR. GALLAGHER: An opinion on a fact?</p> <p>11 MR. GROSSMAN: It's a good point.</p> <p>12 MR. GALLAGHER: This is stuff that we</p> <p>13 can look up in the FTC. Why are we wasting time</p> <p>14 giving Dr. Harris a test?</p> <p>15 MR. GROSSMAN: I'm not giving him a</p> <p>16 test. I'll give you --</p> <p>17 Q. Let me ask you to assume that in 1965 the great</p> <p>18 preponderance of all cigarettes sold in the United</p> <p>19 States were filter cigarettes with deliveries as</p> <p>20 measured by the FTC of over 15 milligrams of tar, and</p> <p>21 that today the great preponderance, 85 percent or</p> <p>22 more, of all cigarettes sold in the United States are</p> <p>23 filter cigarettes with deliveries of less than</p> <p>24 15 milligrams of tar. 15 milligrams or less. Okay?</p> <p>25 A. So I'm to assume nothing about non-filter</p>	<p>1 Q. Almost every major brand is sold in a family, right?</p> <p>2 A. Correct.</p> <p>3 Q. Marlboro, Marlboro Light, Marlboro Ultralight, Camel,</p> <p>4 Camel Light, Camel Ultralight?</p> <p>5 A. Correct.</p> <p>6 Q. Do you know of any differences by style type within</p> <p>7 brands that manufacturers have made in pricing</p> <p>8 decisions?</p> <p>9 A. I can't think of a case that I know of in which</p> <p>10 the wholesale price of one member of a family is</p> <p>11 different than another offhand.</p> <p>12 Q. And that's true notwithstanding differences over time</p> <p>13 in the percentage of that brand family that was light</p> <p>14 and the percentage of that brand family that was full</p> <p>15 flavored, correct?</p> <p>16 MR. GALLAGHER: Objection to the form,</p> <p>17 the use of the term "full flavor".</p> <p>18 A. That's correct.</p> <p>19 MR. GROSSMAN: Why don't we take a</p> <p>20 two-minute break? All right.</p> <p>21 THE VIDEOGRAPHER: It's 3:24 and we</p> <p>22 are off the record.</p> <p>23 (A RECESS WAS TAKEN)</p> <p>24 THE VIDEOGRAPHER: It is 3:38 and we</p> <p>25 are back on the record.</p>
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<p>1 cigarettes? Your hypothetical is that in '65, that</p> <p>2 is, 1965 the great preponderance of all cigarettes are</p> <p>3 filter cigarettes with 16 milligrams of FTC tar?</p> <p>4 Q. Or more.</p> <p>5 A. Or more. Okay. That's the hypothetical.</p> <p>6 Q. And today more than 85 percent of all cigarettes sold</p> <p>7 in the United States have 15 milligrams of tar or</p> <p>8 less.</p> <p>9 A. All right. That's the hypothetical.</p> <p>10 Q. Are you aware of any decisions by the cigarette</p> <p>11 companies with regard to any brands or in general to</p> <p>12 decrease the sale price of cigarettes with</p> <p>13 16 milligrams or more of tar --</p> <p>14 MR. GALLAGHER: Objection to the form.</p> <p>15 Q. -- to meet the decline as posed in the hypothetical --</p> <p>16 MR. GALLAGHER: Sorry.</p> <p>17 Q. -- in the market for cigarettes with 16 or more</p> <p>18 milligrams of tar?</p> <p>19 MR. GALLAGHER: Sorry. Objection to</p> <p>20 the form.</p> <p>21 A. I'd have to do some investigation of that, because</p> <p>22 it is possible that some manufacturers changed some</p> <p>23 high tar brands from premium to discount during the</p> <p>24 time period under discussion, but I do not know</p> <p>25 offhand.</p>	<p>1 Q. Thank you. Doctor, let me direct you if I may to your</p> <p>2 opinion of February 28, 2005.</p> <p>3 A. Yes.</p> <p>4 Q. Now, at the time of that opinion you were commenting</p> <p>5 only on the Knowledge Network survey because the AMS</p> <p>6 survey had not yet been completed; is that correct?</p> <p>7 A. Yes. It was only at best a contemplation stage.</p> <p>8 Q. And with regard to the loss of value approach, your</p> <p>9 final sentence on Page 7 before you address the loss</p> <p>10 of market is, and I quote, moreover, there is already</p> <p>11 sufficient survey evidence to conclude that the loss</p> <p>12 of value approach is feasible, reliable, and</p> <p>13 reproducible. Do you see that?</p> <p>14 A. Yes.</p> <p>15 Q. What's the importance of a survey's being</p> <p>16 reproducible?</p> <p>17 MR. GALLAGHER: Objection to the form.</p> <p>18 Outside his area of expertise, but go ahead.</p> <p>19 A. As in all forms of scientific inquiry, a survey</p> <p>20 result will have higher reliability and credibility if</p> <p>21 it can be reproduced by others. That's the</p> <p>22 importance.</p> <p>23 Q. And in making loss of value calculations based upon</p> <p>24 the Knowledge Network survey, you were assuming its</p> <p>25 reliability without testing its reliability; is that</p>